Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–743 OF 1997

GOPAL SRI RAM, HASHIM YUSOFF AND ZALEHA ZAHARI JJCA

21 NOVEMBER 2005

Companies and Corporations — Pre-incorporation contract — Ratification — Contracts — Contract executed on behalf of company by shareholder prior to its formation — Contract not ratified by company after formation — Whether shareholder personally bound by such contract — Companies Act 1965 s 35

Companies and Corporations — Separate legal entity — Lifting the veil of incorporation — Corporate veil — Piercing of — Whether special circumstances must be established before corporate veil is pierced

Trusts and Trustees — Trustees — Characteristics of trustee — Whether constructive trustee must have title to or right to deal with property on behalf of beneficial owner

Trusts and Trustees — Trusts — Declaration of — Shareholder of company — Whether shareholder may declare himself trustee of property registered in the name of the company

Trusts and Trustees — Trusts — Existence of — Proof — Onus of proving — Whether high standard of proof required

Trusts and trustees — Resulting trust — Characteristics of — Whether resulting trust in existence

On 22 August 1979, a joint venture agreement was entered into between the first defendant, Perman Sdn Bhd ('Perman'), the second plaintiff and the ninth defendant — Kumpulan Fima Sdn Bhd. The first defendant was a private limited company whose shareholding was held equally by one Raja Zainal and his wife, one Tengku Zaidah. It was however incorporated on 26 February 1981, some 18 months after the joint venture agreement. The plaintiffs were private limited companies under the control of one Rangoonwala. Consequent upon the joint venture agreement, the eighth defendant — Fimaly Bulking Services Sdn Bhd ('Fimaly') — was incorporated. 51% of the shares of Fimaly were held by the ninth defendant. The second plaintiff held 46% whereas the first defendant held 3%. The first defendant's 3% stake amounted to 149,999 shares. The remaining one share was held by Raja Zainal. It was Rangoonwalla who, through the plaintiffs, provided Raja Zainal with RM150,000 to pay for the first defendant's 150,000 shares in Fimaly. Raja Zainal paid this RM150,000 into the first defendant's account. The first defendant then paid for the shares and became the registered shareholder of the 149,999 shares of Fimaly. On 1 September 1986, Raja Zainal executed a memorandum of agreement with the plaintiffs wherein: (a) he acknowledged holding through Perman (the first

defendant) 150,000 shares valued at RM150,000 in Fimaly; (b) acknowledged receiving the RM150,000 from the plaintiffs; (c) acknowledged that he had 24 months to buy out those shares, failing which the shares would be at the plaintiffs' disposal. On 28 January 1993, Raja Zainal and his wife both died. The second to fourth defendants were later appointed as personal representatives of Raja Zainal's estate while the fifth to seventh defendants were appointed as personal representatives of his wife's estate. Prior to their appointment as personal representatives, the third and fourth defendants, executed a declaration of trust over the Fimaly shares and also delivered executed proxy forms and blank share transfers to Rangoonwalla. The Fimaly shares were later sold for a considerable sum of money. In the High Court, the plaintiffs claimed that Raja Zainal held the Fimaly shares under either an express or alternatively a constructive trust. The defendants' case in the High Court however was that there was not a trust here but merely a debt for which the estate of Raja Zainal could be liable. However, the High Court found for the plaintiffs and held that the Fimaly shares were held on trust by Raja Zainal. The defendants appealed.

Held, allowing the appeal:

(1) The first defendant — Perman was not in existence when the joint venture agreement was executed. There was nothing to show that the first defendant had ratified the joint venture agreement. Neither was there any evidence to suggest the contrary express agreement required by sub-s (2) of s 35 of the Companies Act 1965. It followed, in accordance with the terms of s 35, that the joint venture agreement should be treated as binding Raja Zainal personally as its executant (see para 3).

(2) The plaintiffs' claim of constructive trust grounded on the plaintiffs having provided the purchase price for the Fimaly shares was a wholly misconceived claim. A constructive trust is imposed by operation of law, that is to say, it overrides the intention of the parties. A true constructive trust exists only in a limited number of cases. The hallmark of a genuine constructive trust is that the constructive trustee has title to the property that is the subject matter of the litigation or claims the right to deal with that property on behalf of the beneficial owner (see paras 7–9).

(3) On the facts, there was no doubt whatsoever that the true owner of the Fimaly shares was the first defendant (Perman Sdn Bhd) and not Raja Zainal. If anyone was to be a trustee of the Fimaly shares, it had to be the first defendant. No one, including Raja Zainal had the power to declare himself a trustee of the first defendant. A company is a separate person from its shareholders. The shareholders have no interest, legal or beneficial over the property of the company. In the instant case, there was no evidence that the first defendant had declared itself a trustee of the plaintiffs in respect of the Fimaly shares (see paras 14–15); *Macaura v Northern Assurance Co Ltd & Ors* [1925] AC 619 followed.

(4) On the facts, the doctrine of resulting trust had no application in the instant case. This case was really a case of a debt and not one of resulting/express trust. There was also nothing in the memorandum of 1 September 1986 constituting Raja Zainal as trustee of any property. It merely confirmed the fact that the RM150,000 was an advance from the plaintiffs to Raja Zainal (see para 16).

(5) In the instant case, Raja Zainal was advanced the RM150,000 for the specific purpose of using it to acquire the Fimaly shares. He was a trustee of the money. This was called a 'Quistclose' trust. If the money had been used for some purpose other than the purchase of Fimaly shares, that would have amounted to a breach of trust by Raja Zainal. This would entitle the plaintiffs to trace the money into the product of the breach of trust. If the first defendant had dishonestly assisted Raja Zainal in the breach, then it would be liable as a fiduciary with a duty to account for the trust money. Here, the primary temporary trust for the purpose of acquiring the Fimaly shares was carried out thereby resulting in a pure loan relationship. Accordingly there was no resulting trust (see para 17).

(6) There was nothing in the memorandum of 1 September 1986 that affirmatively showed a clear intention to create a binding declaration of a trust on the part of the first defendant which was the true owner of the Fimaly shares. The standard of proving that an express trust exists in given circumstances is a high one. What the law requires is an intention to create a trust expressed in clear language (see paras 20–21); *ESPL CM) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422 followed.

(7) It is not open to a court to disregard the corporate personality of a limited company save in very exceptional circumstances. A litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere facade concealing the true facts. In the present instance, nowhere in the plaintiffs' case was there any attempt to show that special circumstances existed indicating that the first defendant was a mere facade concealing the true facts (see para 24); *Law Kam Loy v Boltex Sdn Bhd* [2005] 3 CLJ 355 followed; *Woolfson v Strathclyde Regional Council* 1978 SLT 159 referred.

Per curiam:

All trustees are fiduciaries but not all fiduciaries are trustees. Unlike a constructive trustee, a fiduciary holds his title to property not in favour of the beneficiary but adverse to him or her and is accountable in equity to the true owner (see para 10).

[Bahasa Malaysia summary

Pada 22 Ogos 1979, satu perjanjian usahasama telah dimasuki antara defendan pertama, Perman Sdn Bhd ('Perman'), plaintif kedua dan defendan kesembilan — Kumpulan Fima Sdn Bhd. Defendan pertama adalah sebuah syarikat sendirian berhad yang mana pegangan syernya dipegang sama rata oleh Raja Zainal dan isteri beliau, Tengku Zaidah. Bagaimanapun ia telah ditubuhkan pada 26 Februari 1981, 18 bulan selepas perjanjian usahasama itu. Plaintif-plaintif adalah syarikat sendirian berhad di bawah kawalan Rangoonwala. Berikutan perjanjian uasahasama itu, defendan kelapan — Fimaly Bulking Services Sdn Bhd ('Fimaly') — telah ditubuhkan. 51% syer Fimaly dipegang oleh defendan kesembilan. Plaintif kedua memegang 46% manakala defendan pertama memegang 3%. Kepentingan 3% defendan pertama berjumlah 149,999 syer. Satu lagi syer dipegang oleh Raja Zainal.

Rangoonwalla menerusi plaintif-plaintif, memberi Raja Zainal RM150,000 untuk membayar syer 150,000 defendan pertama dalam Fimaly. Raja Zainal telah membayar RM150,000 ini ke dalam akaun defendan pertama. Defendan pertama kemudian telah membayar untuk syer tersebut dan menjadi pemegang syer berdaftar kepada 149,999 syer Fimaly. Pada 1 September 1986, Raja Zainal telah memasuki satu perjanjian memorandum dengan plaintif-plaintif di mana: (a) beliau telah mengakui memegang melalui Perman (defendan pertama) 150,000 syer bernilai RM150,000 dalam Fimaly; (b) mengakui telah menerima RM150,000 daripada plaintif-plaintif; (c) mengakui bahawa beliau mempunyai 24 bulan untuk menjual syer-syer tersebut, dan jika gagal syer-syer tersebut adalah diserahkan kepada plaintif-plaintif. Pada 28 Januari 1993, Raja Zainal dan isteri beliau telah meninggal dunia. Defendan-defendan kedua hingga keempat kemudiannya telah dilantik sebagai wakil peribadi harta pusaka Raja Zainal manakala defendan-defendan kelima hingga ketujuh telah dilantik sebagai wakil peribadi untuk harta pusaka isteri beliau. Sebelum pelantikan mereka sebagai wakil peribadi, defendan-defendan ketiga dan keempat, telah memasuki satu deklarasi amanah ke atas syer-syer Fimaly dan juga menyampaikan borang-borang proksi yang disempurnakan dan pindah milik syer kosong kepada Rangoonwalla. Syer-syer Fimaly kemudiannya telah dijual untuk sejumlah wang yang besar. Di Mahkamah Tinggi, plaintif-plaintif telah menuntut bahawa Raja Zainal telah memegang syer-syer Fimaly tersebut di bawah satu amanah nyata atau secara alternatifnya amanah konstruktif. Kes defendan-defendan di Mahkamah Tinggi bagaimanapun adalah bahawa tidak terdapat amanah di sini tetapi hanya hutang yang mana harta pusaka Raja Zainal boleh bertanggungjawab. Namun begitu, Mahkamah Tinggi memihak kepada plaintif-plaintif dan memutuskan syer-syer Fimaly dipegang atas amanah oleh Raja Zainal. Defendan-defendan membuat rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Defendan pertama — Perman tidak wujud semasa perjanjian usaha sama tersebut disempurnakan. Tiada apa-apa untuk menunjukkan yang defendan pertama telah meratifikasikan perjanjian usaha sama itu. Tiada juga keterangan untuk mencadangkan perjanjian nyata sebaliknya yang dikehendaki oleh sub-s (2) s 35 Akta Syarikat 1965. Adalah diikuti, menurut terma s 35, perjanjian usaha sama itu patut dianggap sebagai mengikat Raja Zainal secara peribadi sebagai penyempurnanya (lihat perenggan 3).

(2) Tuntutan plaintif-plaintif berhubung amanah konstruktif berasaskan plaintif-plaintif yang memberikan harga belian untuk syer-syer Fimaly sama sekali merupakan satu tuntutan yang salah. Satu amanah konstruktif dikenakan oleh pelaksanaan undang-undang, iaitu, di mana ia menolak niat pihak-pihak. Suatu amanah konstruktif yang sebenarnya hanya wujud dalam sebilangan kes yang terhad. Ciri amanah konstruktif sebenar adalah di mana pemegang amanah konstruktif itu mempunyai hak milik ke atas harta itu yang merupakan perkara pokok litigasi atau mendakwa mempunyai hak untuk mengendalikan harta itu bagi pihak pemilik benefisiari (lihat perenggan 7–9).

(3) Berdasarkan fakta, tiada keraguan apa sekalipun yang pemilik sebenar syer-syer Fimaly adalah defendan pertama (Perman Sdn Bhd) dan bukan Raja Zainal. Jika sesiapapun yang menjadi pemegang amanah syer-syer Fimaly, ia

sepatutnya defendan pertama. Tiada siapa, termasuklah Raja Zainal mempunyai kuasa untuk mengisytiharkan dirinya sendiri seorang pemegang amanah kepada defendan pertama. Sebuah syarikat adalah badan berasingan daripada pemegang syernya. Pemegang syer tidak mempunyai kepentingan, menurut undang-undang atau secara benefisial ke atas harta syarikat itu. Dalam kes ini, tidak terdapat apa-apa keterangan bahawa defendan pertama telah mengisytiharkan dirinya pemegang amanah kepada plaintif-plaintif berhubung syer-syer Fimaly (lihat perenggan 14–15); *Macaura v Northern Assurance Co Ltd & Ors* [1925] AC 619 diikut.

(4) Berdasarkan fakta, doktrin amanah berbangkit tidak digunapakai dalam kes ini. Kes ini hanyalah satu kes hutang dan bukan tentang amanah berbangkit/nyata. Tidak ada apa-apa juga dalam memorandum 1 September 19686 yang menjadikan Raja Zainal sebagai pemegang amanah apa-apa harta. Ia hanya mengesahkan fakta bahawa RM150,000 adalah wang pendahuluan daripada plaintif-plaintif kepada Raja Zainal (lihat perenggan 16).

(5) Dalam kes ini, Raja Zainal telah mendahulukan RM150,000 untuk tujuan khusus untuk menggunakannya bagi mendapatkan syer-syer Fimaly. Beliau merupakan pemegang amanah wang tersebut. Ini dipanggil amanah 'Quistclose'. Jika wang itu digunakan untuk tujuan tertentu selain daripada membeli syer-syer Fimaly, ia akan membentuk satu perlanggaran amanah oleh Raja Zainal. Ini akan memberi hak kepada plaintif-plaintif untuk mengesan wang itu ke mana perlanggaran amanah itu berlaku. Jika defendan pertama secara tidak jujur membantu Raja Zainal dalam perlanggaran itu, maka ia akan bertanggungjawab sebagai satu fidusiari dengan satu kewajipan untuk menjaga wang amanah itu. Di sini, amanah utama sementara bagi tujuan mendapatkan syer-syer Fimaly telah dilaksanakan dan menghasilkan satu hubungan pinjaman semata-mata. Oleh demikian, tidak ada amanah berbangkit (lihat perenggan 17).

(6) Tidak ada apa-apa dalam memorandum pada 1 September 1986 yang secara sah menunjukkan satu niat nyata untuk membentuk satu deklarasi yang mengikat suatu amanah di pihak defendan pertama yang merupakan pemilik sebenar syer-syer Fimaly. Piawai membuktikan yang satu amanah nyata wujud berdasarkan keadaan yang diberikan adalah tinggi. Apa yang diperlukan oleh undang-undang adalah satu niat untuk membentuk suatu amanah yang dinyatakan dalam bahasa yang jelas (lihat perenggan 20–21); *ESPL CM) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422 diikut.

(7) Ia tidak terbuka kepada mahkamah untuk tidak menghiraukan personaliti korporat sebuah syarikat berhad kecuali dalam keadaan yang luar biasa. Litigan yang memohon campur tangan mahkamah untuk menembusi tabir korporat hendaklah membuktikan keadaan istimewa dengan menunjukkan bahawa syarikat yang dipersoalkan hanyalah dalih semata-mata untuk menyembunyikan fakta sebenar. Dalam keadaan semasa, tidak ada apa-apa langsung dalam kes plaintif-plaintif yang menunjukkan apa-apa percubaan untuk menunjukkan terdapat keadaan istimewa yang wujud bagi menandakan bahawa defendan pertama hanyalah satu dalih untuk menyembunyikan fakta sebenar (lihat perenggan 24); *Law Kam Loy v Boltex Sdn Bhd* [2005] 3 CLJ 355 diikut; *Woolfson v Strathclyde Regional Council* 1978 SLT 159 dirujuk.

Per curiam:

Semua pemegang amanah adalah fidusiari tetapi bukan semua fidusiari adalah pemegang amanah. Berbeza dengan pemegang amanah konstruktif, fidusiari itu memegang hak miliknya ke atas hartanah yang tidak memihak kepada benefisiari tetapi menentangnya dan bertanggungjawab dalam ekuiti kepada pemilik sebenar (lihat perenggan 10).]

Notes

For a case on characteristics of trustees, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2244.

For cases on declaration of trusts, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2308–2310.

For cases on existenve of trusts, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2316–2319.

For cases on lifting the veil of incorporation, see 3(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 670–692.

For cases on ratification of pre-incorporation contract, see 3(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 523–526.

For cases on resulting trusts generally, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2148–2188.

Cases referred to

Bannister v Bannister [1948] 2 All ER 133 (refd)
Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567 (refd)
Dubai Aluminium Ltd v Salaam [2002] UKHL 48 (refd)
ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd [2005] 2 MLJ 422 (folld)
Hon Kon Kim v Betsy Lim Gek Kim [2001] 4 SLR 340 (refd)
Law Kam Loy & Anor v Boltex Sdn Bhd & Ors [2005] MLJU 225 (folld)
Macaura v Northern Assurance Co Ltd & Ors [1925] AC 619 (folld)
Royal Brunei Airlines Sdn Bhd v Tan [1995] 3 WLR 64 (refd)
Twinsectra Ltd v Yardley [2002] 2 AC 164 (refd)
Westdeutschc Landesbank Girozentrale v Islington LBC [1996] AC 669 (refd)
Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd [2002] 1 MLJ 143 (refd)
Woolfson v Strathclvde Regional Council 1978 SLT 159 (refd)

Legislation referred to

Companies Act 1965 s 35

Appeal from: Suit No D5–22–385 of 1996 (High Court, Kuala Lumpur)

Joginder Singh (Zaitoon Othman with him) (Zaitoon Othman & Associates) for the appellants.

Porres P Royan (M Nagarajah and Lau Kee Sern with him) (Shook Lin & Bok) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This appeal was originally argued before a differently constituted Bench comprising PS Gill, Rahmah Hussein JJCA and me. Since the argument could not be completed, the appeal was adjourned to a date to be fixed. In the interim, due to supervening events the Bench that originally heard the appeal could no longer complete the hearing. Accordingly, a hearing de novo was ordered. It is pursuant to the order that the appeal has now come to be heard before us.

[2] The facts of this case are uncomplicated. In their narration I shall, for convenience, refer to the parties according to their titles in the court below. The plaintiffs are two private limited companies. The evidence in the court below was that they are under the control of a man by the name of Mohamed Aly Rangoonwala ('Rangoonwala'), a British subject of Pakistani origin. I am not entirely sure how this element of control is relevant to the issues at hand. Rangoonwala was a close friend and business associate of one Raja Dato Haji Zainal Abidin ('Raja Zainal'), now deceased. He wanted to go into business with Raja Zainal. This is the way in which they went about it.

[3] A joint venture agreement dated 22 August 1979 was entered into between three parties. One of them was the first defendant, Perman Sdn Bhd. I had better say something about it straightaway. It is private limited company whose shareholding was held equally by Raja Zainal and his wife, Tengku Zaidah. It was incorporated on 26 February 1981, that is to say, about 18 months after the joint venture agreement. So, it was not in existence when the joint venture agreement was executed. The effect of that is spelt out in s 35 of the Companies Act 1965 which says:

> (1) Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of a company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it had been in existence at the date of the contract or other transaction and had been a party thereto.
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> (2) Prior to ratification by the company the person or persons who purported to act in the name or on behalf of the company shall in the absence of express agreement to the contrary be personally bound by the contract or other transaction and entitled to the benefit thereof.

There is nothing to show that the first defendant had ratified the joint venture agreement. Neither is there any evidence to suggest the contrary express agreement required by sub-s (2). It follows, in accordance with the terms of s 35, that the joint venture agreement is to be treated as binding Raja Zainal personally as its executant.

[4] The other two parties to the joint venture agreement were the second plaintiff and a company called Kumpulan Fima Sdn Bhd, the ninth defendant in the court below. But it is not a party to the present appeal. Consequent upon the joint venture agreement, a company called Fimaly Bulking Services Sdn Bhd ('Fimaly') was incorporated. It was the eighth defendant in the court below but is also not a party to this appeal. 51% of the shares of Fimaly were held by the ninth defendant whilst the second plaintiff and the first defendant held 46% and 3% respectively. The first

defendant's 3% stake amounted to 149,999 shares. The remaining 1 share was held by Raja Zainal. It is common ground that Raja Zainal had no money to subscribe for the shares in Fimaly. Rangoonwalla's evidence is that it was he, through the plaintiffs, who provided Raja Zainal with RM150,000 to pay Fimaly for the 150,000 shares. Raja Zainal paid this RM150,000 into the first defendant's account. The first defendant then paid for the shares and became, the registered shareholder of the 149,000 shares of Fimaly.

[5] Later, on 1 September 1986, Raja Zainal executed a document which says this:

> Memorandum of Agreement Between European Commodities Limited/European Commodities Sdn Bhd (referred to as BC) and Raja Zainal bin Raja Haji Ahmad through his holding company Perman Holdings (referred to as RZ)
>
> 1 RZ is holding 150,000 shares at M$1.00 each for a total of M$150,000 being paid up value in Fimaly Bulking Sdn Bhd.
>
> 2 This investment of M$150,000 has been put in RZ's name by BC on the following terms and conditions.
>
> (a) RZ has the option, within the next twenty four months (ie till 1 September 1988) to buy out these shares at par value plus actual interest agreed between European Commodities Limited and European Commodities Sdn Bhd, which rates have been duly approved by Bank Negara, Malaysia.
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> (b) If RZ decides he is not interested in buying these shares within the next twenty-four months as detailed at 'a' above, then these shares will be at the disposal of EG and RZ has not to pay any amount whatsoever.

[6] On 28 January 1993, Raja Zainal and his wife both died in a tragic accident at sea. The second to fourth defendants were later appointed as personal representatives of Raja Zainal's estate while the fifth to seventh defendants were appointed as personal representatives of his wife's estate. It is in evidence that the third and fourth defendants prior to their appointment as personal representatives, executed a declaration of trust over the Fimaly shares and also delivered executed proxy forms and blank share transfers to Rangoonwalla. It is also in evidence that the Fimaly shares were later sold for a considerable sum of money which sum with interest has been paid into court.

[7] The plaintiffs' case in the court below was that Raja Zainal held the Fimaly shares under either an express or alternatively a constructive trust. The latter claim of constructive trust was grounded on the plaintiffs having provided the purchase price for the Fimaly shares. That, of course, is a wholly misconceived claim. And I will explain why although it is a digression from the mainstream in this case because it is a point of such fundamental importance.

[8] When A provides the whole of the purchase price for real or personal property but has that property registered in B's name, there is a resulting trust in A's favour. Here equity presumes an intention in A that the property is not to belong beneficially to B. The leading authority on the point is *Westdeutschc Landesbank Girozentrale v Islington LBC* [1996] AC 669, where Lord Browne-Wilkinson said:

> Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did

A not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see Underhill and Hayton, *Law of Trusts and Trustees*, p 317 *et seq*; *Vandervell v Inland Revenue Commissioners* [1967] B 2 AC 291, 312 *et seq*; *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 288 *et seq*. (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest: ibid, and *Quistclose Investments Ltd v Rolls Razor Ltd (In Liquidation)* [1970] AC 567. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. *A resulting trust is not imposed by law* C *against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention.* Megarry J in *In re Vandervell's Trusts (No 2)* suggests that a resulting trust of type (B) does not depend on intention but operates automatically. I am not convinced that this is right. If the settler has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust: the undisposed of equitable interest vests in the Crown as bona vacantia: see *Re West Sussex Constabulary's Widows, Children and Benevolent* (1930) Fund Trusts [1971] Ch 1. (Emphasis added.)

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[9] By contrast, a constructive trust is imposed by operation of law, that is to say, it overrides the intention of the parties. A true constructive trust exists only in a limited number of cases. It is not relevant for present purposes to list all of them here. Suffice if I give two fairly obvious examples. The first is where there is a valid and E binding contract for the sale of land in which case equity imposes a constructive trust upon the vendor (see *Wong Siew Choong Sdn Bhd v Anvest Corp Sdn Bhd* [2002] 1 MLJ 143 per Abdul Kadir Sulaiman JCA). The second is where there is a failure of formalities to create a trust and the party asserting absolute title against the beneficial owner is using statute as an engine of fraud. See, *Bannister v Bannister* [1948] 2 All ER 133; *Hon Kon Kim v Betsy Lim Gek Kim* [2001] 4 SLR 340. The hallmark of a F genuine constructive trust is that the constructive trustee has title to the property that is the subject matter of the litigation or claims the right to deal with that property on behalf of the beneficial owner.

[10] This brings into sharp focus a proposition central to the law of trusts. It is this. All trustees are fiduciaries but not all fiduciaries are trustees. Unlike a constructive G trustee, a fiduciary holds his title to property not in favour of the beneficiary but adverse to him or her and is accountable in equity to the true owner. This proposition, not properly appreciated, with respect, even by Lord Browne-Wilkinson in the Westdeutsche case, was brought home with clarity by Lord Millett in *Dubai Aluminium Ltd v Salaam* [2002] UKHL 48. He said:

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> Unlike HB in Mara's case, Mr Amhurst did not assume the position of a trustee on behalf of others. He never had title to the trust funds or claimed the right to deal with them on behalf of those properly entitled to them. He acted throughout on his own or his confederates' behalf. The claim against him is simply that he participated in a fraud. Equity gives relief against fraud by making any person sufficiently implicated in the fraud I accountable in equity. In such a case he is traditionally (and I have suggested unfortunately) described as a 'constructive trustee' and is said to be 'liable to account as a constructive trustee'. But he is not in fact a trustee at all, even though he may be liable to account as if he were. He never claims to assume the position of trustee on behalf of others, and he may be liable without ever receiving or handling the trust property. If he receives the trust property at all he receives it adversely to the claimant and by an unlawful transaction which

> is impugned by the claimant. He is not a fiduciary or subject to fiduciary obligations; and he could plead the Limitation Acts as a defence to the claim.
>
> In this second class of case the expressions 'constructive trust' and 'constructive trustee' create a trap. As Jules Sher QC, sitting as a deputy judge of the Chancery Division, recently observed in *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457 at p 479, [2000] 1 WLR 707 at p 731 this 'type of ... trust is merely the creation by the court ... to meet the wrongdoing alleged: there is no real trust and usually no chance of a proprietary remedy'. The expressions are 'nothing more than a formula for equitable relief' (see *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)* [1968] 2 All ER 1073 at p 1097, [1968] 1 WLR 1555 at p 1582 per Ungoed-Thomas J). I think that we should now discard the words 'accountable as constructive trustee' in this context and substitute the words 'accountable in equity'.

[11] It is this failure on the part of the plaintiffs to distinguish between a true constructive trust, a resulting trust and a duty to account in equity as a fiduciary that caused them to be led astray when addressing the trial judge on this issue. Be that so, it is to be noted that the trial judge found for the plaintiffs on the basis of an express, and in the alternative, an implied trust, which is another name for the device of the resulting trust.

[12] Returning now to the mainstream, the defendants' case in the High Court was that there was not a trust here but merely a debt for which the estate of Raja Zainal may be liable. After a trial at which viva voce evidence was led, the trial judge found for the plaintiffs and held that the Fimaly shares were held on trust by Raja Zainal. He said:

> In any event, where there is a purchase in the name of another, a trust is often implied (see the *Law of Trusts by LA Sheridan* (12th Ed) at pp 111 and 112) and it would appear to apply not only to trusts of real property but the principle applies to personalty. In other words, the law of trusts recognises that what started out as a loan may nonetheless amount to a trust which conferred beneficial rights upon the party (*Spencer v Brown* (1987) 18 Fam Law 291).
>
> I therefore was of the view that the evidence adduced by the plaintiffs more than justify for a finding by me that there was a trust in favour of the plaintiffs in respect of the said shares registered under the name of Raja Zainal and Perman. In other words the plaintiffs are the beneficial owners of the said shares.

The defendants have appealed against that decision.

[13] When the case was first argued before the earlier Bench, it occurred to me that the issue of whether there was a trust or a debt was not the central issue in this case. The real question is: who was the true owner of the Fimaly shares? For it is only the owner of property who may declare himself as trustee. All in the court below appear to have proceeded on the basis that Raja Zainal was the true owner. But that, I think, with respect, is imitating Nelson at Trafalgar — turning a blind eye to reality. It is for this reason that arguments could not be completed at the earlier hearing as counsel had to be afforded an opportunity to deal with the 'missed' point.

[14] Looking at the undisputed facts, there is no doubt whatsoever that the true owner of the Fimaly shares was Perman Sdn Bhd, the first defendant: not Raja Zainal. So if anyone was to be a trustee of the Fimaly shares it must be the first defendant

and nobody else. For no one, including Raja Zainal had the power to declare himself a trustee of someone else's property; in this instance the first defendant. It has to do with a principle which lies at the heart of company law. It is that a company is a separate person from its shareholders. The latter have no interest, legal or beneficial over the property of the former. As Lord Buckmaster said in *Macaura v Northern Assurance Co Ltd & Ors* [1925] AC 619:

> Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the Company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

[15] There is not a jot of evidence that the first defendant ever declared itself a trustee of the plaintiffs in respect of the Fimaly shares. In my judgment, there remain only two questions on the facts established at the trial and on the pleaded cases. First, whether the first defendant is a trustee of the Fimaly shares under a resulting trust; second, whether the first defendant is under a duty to account for the Fimaly shares as a fiduciary.

[16] Let me take the first point. The plaintiffs own evidence is that the money was handed to Raja Zainal who paid it into the first defendant's account. Following this, the first defendant paid those monies to Fimaly, was issued Fimaly shares and became the registered owner of those shares. It is not the plaintiffs' case that they purchased the Fimaly shares but had those shares registered in the first defendant's name as nominal owner. It follows that the doctrine of a resulting trust has no application to the facts of this case. Indeed, I would agree with learned counsel for the defendants, Mr Joginder Singh, that the only reasonable inference that is to be drawn from the proved and admitted facts is that this is in reality a case of a debt and not an express trust. Looking at the memorandum of 1 September 1986, there is nothing in it that constitutes Raja Zainal as trustee of any property. It merely confirms the fact that the RM150,000 was an advance from the plaintiffs to Raja Zainal.

[17] Next, the second point. In the context of the present case, for the first defendant to be accountable to the plaintiffs for the Fimally shares, the RM150,000 paid to Raja Zainal by the plaintiffs must be trust monies in the sense that it was to be used for the specific purpose of purchasing the Fimaly shares. If the purpose had failed there would have been a resulting trust in the plaintiffs' favour. Here, Raja Zainal was advanced the RM150,000 for the specific purpose of using it to acquire the Fimaly shares. So he was a trustee of the money. This is called a 'Quistclose' trust, taking its name from the leading case on the point, Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567. In those circumstances, if the money had been used for some purpose other than the purchase of Fimaly shares, that would amount to a breach of trust by Raja Zainal. This would entitle the plaintiffs to trace the money into the product of the breach of trust. And, if the first defendant (confining myself to the present facts) dishonestly assisted Raja Zainal in the breach, then it would be liable as a fiduciary with a duty to account for the trust money. See, *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 WLR 64; *Twinsectra Ltd v Yardley* [2002] 2 AC 164. But that is not what happened here. The RM150,000 was in fact used for the very purpose for which it was paid over to Raja Zainal. That brings me to the rider to the Quistclose principle. It is that once the purpose for which the money was advanced is achieved, the beneficial ownership in the money vests absolutely in the intended

recipient, in this case, the first defendant. And when the shares were registered in the name of the first defendant, it became the sole beneficial owner of those shares. Thereafter no other person had any right to deal with them. This approach reinforces my earlier conclusion that the advance to Raja Zainal by the plaintiffs was in truth and fact a loan.

[18] In this context, it is useful to quote the following passage from Hayton & Marshall's Commentary & Cases on the *Law of Trusts & Equitable Remedies* (10th Ed) which establishes the point I seek to make:

> Where property is purchased with the aid of X's moneys it is vital whether X paid over the moneys as purchaser or lender. If X provided £5,000 of a £100,000 purchase price of a house put in Y's name then if X lent the £125,000 he is only entitled as a personal creditor to the £25,000 and any agreed interest, whereas if he provided the £25,000 as purchaser he is entitled to a quarter share in the house. Loan and purchase by way of resulting trust are thus mutually exclusive though in an exceptional case *a loan arrangement may commence as a primary temporary trust to carry out a purpose which, if carried out, results in a pure loan relationship but which, if not carried out, gives rise to a secondary final express or resulting trust as in Barclays Bank Ltd v Quistclose Investments Ltd.* (Emphasis added.)

[19] So too here. The primary temporary trust for the purpose of acquiring the Fimaly shares was carried out thereby resulting in a pure loan relationship. Accordingly there was no resulting trust.

[20] Mr Roy an for the defendants sought to argue that there was a third possible basis on which the first defendant could be made liable as a trustee of the Fimaly shares, namely, agency. In order for that argument to succeed it must be established that Raja Zainal, acting as agent for the first defendant declared the first defendant to be trustee of the Fimaly shares. But that is not at all the case here. What you have is a document; the memorandum dated 1 September 1986, which does not even constitute Raja Zainal as trustee. Indeed, the word 'trust' or equally compelling language is absent in that document. There is nothing in that document or the surrounding circumstances that goes to affirmatively show a clear intention to create a binding declaration of a trust on the part of the first defendant which is the true owner of the Fimaly shares.

[21] The standard of proving that an express trust exists in given circumstances is a high one. For, it is the policy of the law that no person's property should be burdened with the interest of another in the absence of the clearest proof. What the law requires is an intention to create a trust expressed in clear language. Quite recently we had to deal with this very issue. It was in *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422. We there said:

> [15] There is one other point. In his written outline of submission, learned counsel for the plaintiff has argued that it is for the defendant to prove beyond a reasonable doubt that a trust exists. In support he relies on the decision of the Court of Appeal of the Federated Malay States in *Hameeda Bee v Mrs P Seenivasagam* [1950] MLJ 267. The actual ratio of that case is accurately summed up in the headnote of the report, namely, 'that clear and unequivocal language must be used to establish a trust'. However, in his brief judgment Pretheroe Ag CJ, quoted the following passage from the judgment of Viscount Cave LC in *Po Kin & Anor v Po Shein AIR* 1926 PC 77:
>
> > But on the other side there are also some most important facts. To begin with, and this

A no doubt is the most important of all, all this property stood in the name of the deceased; and on some of the documents it is stated that the deceased (apparently the deceased in person) paid the money. Of course the burden is on the appellant to displace the natural inference to be drawn from that fact. The burden is no doubt a difficult one to discharge, because in all these benamidar transactions the very object of the parties is secrecy; but still the person who alleges that property conveyed to another B belongs to him must prove his allegation and prove it beyond reasonable doubt.

[16] It is apparent from that passage that the learned Lord Chancellor was merely referring to a set of circumstances where a plaintiff claims to be the true owner of property registered in the name of the defendant and apparently paid for by the defendant. In our judgment, that passage has no relevance whatsoever to the facts of the present instance. Further, we do C not think by the phrase 'beyond reasonable doubt', the Lord Chancellor was imposing the criminal standard of proof in those circumstances. He was merely emphasising the high degree of proof demanded by the circumstances postulated by him.

[22] To sum up, my views on this case are as follows:

D (i) the first defendant was the true owner of the 150,000 Fimaly shares;

(ii) Raja Zainal had no authority in law to attempt to deal with the first defendant's property, namely the Fimally shares;

(iii) neither the memorandum of 1 September 1986, nor the surrounding E circumstances support an intention by the first defendant to create an express trust over the 150,000 Fimally shares;

(iv) the proved and admitted facts do not establish the requirements of a resulting trust of the Fimally shares in the plaintiffs' favour;

F (v) the first defendant is not a fiduciary of the 150,000 shares and owes no duty to account for them or their proceeds to the plaintiff;

(vi) on the proved and admitted facts this is a case of a personal debt owed by Raja Zainal to the plaintiffs.

G The first defendant is not a trustee for the plaintiffs of the Fimaly shares.

[23] I must add that the trial judge proceeded on the alternative footing of an express trust based on a deed of trust signed by two of the three personal representatives of the estate of Raja Zainal. But that document is not worth the paper on which it was written because the estate of Raja Zainal has no business to deal with H the property of the first defendant.

[24] Before concluding I would draw attention to the fact that it not open to a court to disregard the corporate personality of a limited company save in very exceptional circumstances. In the very recent case of*Law Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] MLJU 225, I ventured to collect and discuss some of the I authorities which, in my view, represent the current jurisprudence in this area of the law. I find it unnecessary to repeat what I there said. Suffice to say that a litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere facade concealing the true facts. See *Woolfson v Strathclvde Regional Council* 1978 SLT 159. In the present

instance, nowhere in the plaintiffs' case is there any attempt to show that special circumstances exist indicating that the first defendant is a mere facade concealing the true facts.

[25] For the reasons already given, I would allow this appeal and set aside the orders of the trial judge. I would also enter judgment for the defendants and dismiss the plaintiffs' action. The plaintiffs must pay the costs of this appeal and those incurred in the High Court. The deposit in court shall be refunded to the defendants.

[26] My learned brother Hashim Yusoff JCA and my learned sister Zaleha Zahari JCA have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by John Paul Simon